American Pacific Concrete Pipe Company, Inc. ***and*** **General Truck Drivers, Warehousemen and Helpers Union Local 467, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Case 31-CA-10098(E)

23 August 1984

SUPPLEMENTAL DECISION AND ORDER

By Chairman Dotson and Members Zimmerman and Dennis

On 27 April 1984[1] Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings, and conclusions[3] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the application of Respondent American Pacific Concrete Pipe Company, Inc. for attorney fees and expenses under the Equal Access to Justice Act is denied, and the confidential financial statement attached to and incorporated in the Respondent's application for fees shall be sealed and withheld from public disclosure, under the provision of Section 102.147(g) of the Board's Rules and Regulations.

[1] The judge inadvertently dated the decision 27 April 1983.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] We agree with the judge's conclusion that the Respondent is ineligible for an award under the Equal Access to Justice Act; 5 U.S.C. § 504(EAJA); NLRB Rules and Regulations, § 102.143, because its net worth, without considering depreciation, exceeded $5 million. See *W. C. McQuaide, Inc.*, 270 NLRB 1197 (1984); 5 U.S.C. § 504(b)(1)(B); NLRB Rules and Regulations, § 102.143(c)(5).

We find it unnecessary to pass on the judge's suggestion that it is never appropriate to defer ruling on an application for attorney's fees pending conclusion of litigation of a backpay proceeding.

SUPPLEMENTAL DECISION

Statement of the Case

Clifford H. Anderson, Administrative Law Judge. Pursuant to a backpay specification in the above-captioned matter issued by the Regional Director for Region 31 of the National Labor Relations Board on September 23, 1983, a trial is being conducted regarding the matters raised by the backpay specification. The backpay matter remains in litigation and the record is not as yet closed. On January 31, 1984, counsel for the General Counsel during the backpay specification litigation moved to delete from the backpay specification all backpay amounts owed Mr. Milton Womack. I approved that motion without opposition on the same day. On March 1, 1984, American Pacific Concrete Pipe Company, Inc. (Respondent) filed with the Board an application for an award of fees and and other expenses pursuant to the Equal Access to Justice Act (Pub. L. 96-81, Stat. 2325, herein EAJA) with respect to the Womack allegation. The Board on March 9, 1984, issued an order referring the application to me for appropriate action. On March 29, 1984, the General Counsel filed a motion to dismiss the application. Respondent, on April 2, 1984, filed an amendment to its application alleging additional expenses. Respondent has not however filed a response to the General Counsel's motion to dismiss the application.[1]

This supplemental decision under the Equal Access to Justice Act is issued pursuant to Section 102.153 of the Board's Rules and Regulations and is based on the application and the motion to dismiss.

Issues

Of the numerous issues raised by the General Counsel in his motion, two threshold issues may be dealt with. The first is whether or not my consideration of the issues raised by the application[2] should be deferred until all issues outstanding in the backpay specification are resolved. The second issue is whether or not Respondent qualifies for recovery under the Equal Access to Justice Act in light of the net worth declarations contained in the application, i.e., is applicant's net worth too large?[2]

Findings and Conclusions

I. The Deferral Issue

The General Counsel concedes, and I agree, that Respondent's application was timely filed with respect to the Womack allegations. It is also true, as the General Counsel avers, that the remainder of the issues raised by the backpay specification[3] has not been fully litigated nor decided. The General Counsel argues that the resolution of the current application should be deferred or held in abeyance by me, pending conclusion of the backpay specification litigation. Respondent has taken no position with respect to this issue.

[1] The Board's Rules and Regulations Sec. 102.150 provides that the General Counsel may file a motion to dismiss the application and further provides: "Within 15 days after service of any motion to dismiss, the applicant shall file a response thereto." While the General Counsel's motion to dismiss contains a request for deferral, that request specifically did not seek a delay in ruling on the motion. Further, the General Counsel could not alter Applicant's rights under Sec. 102.150 in any event.

[2] The General Counsel specifically conceded the application was timely with respect to the Womack matter.

[3] The hearing in the matter is scheduled to reconvene on June 19, 1984.

Without commenting on the merits of the General Counsel's arguments that that instant matter should be deferred pending resolution of the backpay specification adjudication, I find that it was inappropriate for an administrative law judge to defer a matter timely filed under the Equal Access to Justice Act without a specific rule and regulation, Board decision, or other clear statement of policy allowing such a procedure. I find that the need for speedy adjudication of matters placed in issue before administrative law judges requires that I proceed in due course, absent such guiding authority. If the General Counsel seeks to create a deferral policy, the matter should be taken to the Board on exceptions to this decision. Accordingly, I find deferral is inappropriate and shall deny the General Counsel's motion in this regard.

II. THE NET WORTH ARGUMENT

Section 504 (b)(1)(B) of the Equal Access to Justice Act excludes from coverage any association or organization whose net worth exceeded $5 million at the time the adversary adjudication was initiated. The Board's Rules and Regulations Section 102.143(c)(5) provides among the eligible applicants to receive an award:

> Any other partnership, corporation, association, or public or private organization with a net worth of not more than $5 million and not more than 500 employees.

Section 102.143(d) of the Board's Rules and Regulations states:

> For purposes of eligibility, the net worth and number of employees of an applicant shall be determined as of the date of the complaint in an unfair labor practice proceeding or the date of the notice of hearing in a backpay proceeding.

Respondent is a corporation and is therefore subject to the $5 million net worth limitation contained in the quoted provisions. Respondent's application contains a balance sheet which is asserted to be the last annual balance sheet prepared before the initiation of the backpay proceeding. The balance sheet[4] indicates that the Applicant's net worth for the appropriated period qualifies the Applicant for EAJA awards. The General Counsel in its motion to dismiss argues that the sealed exhibit submitted by Respondent reveals that the Applicant's net worth was calculated by deducting an "allowance for depreciation" for certain asset values. Further, the General Counsel argues, if the "allowance for depreciation" is disallowed, i.e., Respondent's assets are valued without depreciation, Respondent's net worth is too large for recovery under the Equal Access to Justice Act.[5]

Without going into greater detail regarding the sealed exhibit, I find that if an allowance for depreciation is allowed against certain fixed assets, Respondent is not disqualified under the cited provisions for an Equal Access to Justice Act award on the basis of its net worth. If those assets must be evaluated without reduction of value for depreciation, as contended by the General Counsel, Respondent's application fails to qualify pursuant to Rules and Regulations 102.143(c)(5) because it reflects a net worth in excess of $5 million.

No Board cases on this issue have been discovered. The General Counsel, in support of his motion, cited the decision of Administrative Law Judge Richard D. Taplitz of *Malcolm Boring Co.*, JD-80-82, which was adopted by the Board in the absence of exceptions in an unpublished decision dated May 5, 1982. In that decision Judge Taplitz considered the issue presented here, i.e., whether or not depreciation should be allowed in evaluating asset value for a net-worth calculation. A decision by an administrative law judge approved without exceptions by the Board does not constitute either an opinion of the Board or binding authority on other judges. Therefore, Judge Taplitz' decision in *Malcolm Boring* has essentially no precedential as opposed to persuasive value in deciding the issue presented herein. In the absence of any controlling Board authority on the issue I have considered the Taplitz decision for its analysis and reasoning on the question. Based on the legislative history of the EAJA as explicated in that decision, I am persuaded that the Equal Access to Justice Act and the Board's Rules and Regulations require that depreciation not be allowed to reduce an applicant's net worth for purposes of qualifying for EAJA awards.

While the Equal Access to Justice Act does not contain a definition of the term "net worth," the legislative history is more forthcoming. Both House Report 96-1418 (September 26, 1980) at 15 and Senate Report 96-253 at 17 state:

> Net worth is calculated by subtracting total liabilities from total assets. In determining the cost of assets, the cost of acquisition rather than fair market value should be used.

The Administrative Conference of the United States had occasion to discuss the term "net worth." In its proposed draft of model regulations for the implementation of the EAJA at Section 302(d)(1)(A) the conference states:

> Each asset may be valued at the lower of either acquisiton cost or fair market value as to the date on which the proceeding was initiated.

Subsequently, and after receiving comments from various agencies, the Administrative Conference of the United

[4] Respondent as part of its application requested that the financial statement identified herein as the balance sheet not be included in the public record but rather be preserved from disclosure consistent with the Board's Rule and Regulation, Sec. 102.147(g). The General Counsel opposes maintenance of a sealed exhibit in this case. In view of my ultimate ruling in the matter, I grant the motion of Respondent. As a consequence, the details of Respondent's net worth will be discussed only with the specificity necessary to rule on the issues presented.

[5] While it is true that the balance sheet submitted by Respondent speaks to October 31, 1982, and the backpay specification in the instant matter issued on September 23, 1983, almost an entire year later, Respondent did not address the General Counsel's motion to dimsiss or seek to file other matter as provided in Board Rule 102.147(d). Respondent cannot now supply more recent figures if the October 31, 1982 figures fail to qualify the Applicant for an EAJA award. Thus, it must be assumed that the October 31, 1982 balance sheet reflects the facts and figures necessary to determine the Applicant's net worth are at least as favorable to Respondent as more current figures may have been.

States issued its Model Rules and some comments thereon. That report stated at 14:

> *Valuation of assets*: One controversial aspect of the draft rule was its provision that determinations of net worth may be based on either acquisition cost or fair market value of assets. The exact meaning of "net worth" is not described in the Act or the Conference Report, although Committee reports on S.265 state that acquisition cost should be used. We interpreted this as a Congressional intent to permit a low valuation, and provided for the use of fair market value where that is lower. The American Metal Stamping Association supported this approach, but NASA, the Treasury Department, the Justice Department and HHS objected to it. NASA believes all determinations should be based on fair market value. The other agencies said the legislative history of S.265 should be followed exactly; they noted that acquisition cost would avoid the need for appraisals and would also exclude adjustments to basis for items like depreciation or capital additions. As a compromise, DOE suggested that fair market value be used only when it is lower and reasonably provable. In revising the rule to give applicants more flexibility in demonstrating their net worth, we have eliminated the reference to any standard of valuation. Applicants that are clearly eligible will probably be able to demonstrate eligibility regardless of the standard used and should be permitted to submit net worth information using whatever standard is convenient. Where there is a real question about eligibility, applicants and agencies may take into account the reference to acquisition cost in the legislative history of S.265.; in most cases, we believe this will work to the applicant's benefit.

Neither the final draft model regulations of the Administrative Conference of the United States nor the Board's Rules and Regulations further define "net worth" or set forth any criteria for evaluating it.

It is clear that many values may be assigned to a particular asset. Fair market-value appraisals of assets as of the date that net worth is to be determined would be ideal, but would involve complex and costly efforts to acquire the information. Acquisition price with the passage of time may be either too high or too low depending (1) on the effects of inflation on replacement costs and (2) of the effects of wear and tear or technological obsolescence. Measures of valuation involving depreciation are specifically established or allowed by the Internal Revenue Service for purposes of income tax preparation. These methods, while permissible for tax calculation, do not necessarily reflect actual value of assets at particular times. Given the numerous possible ways of establishing value, it is appropriate to look closely to the EAJA and its legislative history for its intended means of establishing asset value. As Judge Taplitz said in *Malcolm Boring*, supra, slip op. at 4–5:

> The EAJA was intended to give relief to small enterprises. In doing so the Act used the $5 million net worth approach. The net worth is geared to the size of the company and not to bookkeeping methods for tax purposes. As noted above there are a number of problems in determining the value of assets. In an EAJA case there is no sale of assets so no purchase price can be used. Value can be determined by taking the cost of acquisition and deducting depreciation or adding appreciation but in either case an appraisal would be required to determine whether there was a depreciation or an appreciation and the amount thereof. In many situations a great deal of property would be involved and such an appraisal could be an extremely cumbersome procedure. The approach the legislature took in the EAJA was to avoid the need to determine whether property depreciated or appreciated. The legislative history set forth above clearly establishes that both the House and Senate intended that "in determining the value of assets, the cost of acquisition rather than fair market value should be used." The Administrative Conference of the United States in its original draft of model rules was more equivocal. It proposed that assets be valued at the lower of either acquisition cost or fair market value. After further consideration the Administrative Conference concluded that where there was a real difference about eligibility, applicants and agencies could take into account the reference to acquistion cost in the legislative history. The Board did not treat with that problem in its rule.
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> The legislative history is clear and I believe that it is binding on me. Value is determined by cost of acquisition and is so evaluated the [applicant] does not qualify for a relief under the EAJA because its net worth exceed $5 million. I shall therefore recommend that the [Applicant's] application be denied.

I have determined, in agreement with the General Counsel, that depreciation is not permissible in evaluation the Applicant's net worth. Given that finding, the Applicant's balance sheet reflects a net worth in excess of $5 million. Accordingly, the Applicant is not eligible for an award under EAJA. Therefore, I shall dismiss the instant application.[6]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The application of American Pacific Concrete Pipe Company, Inc. for attorney's fees and expenses under the Equal Access to Justice Act is hereby denied.

[6] The General Counsel's motion to dismiss also asserts that the Applicant's EAJA application was deficient for a number of other reasons. Given the results, there is no need to rule on these additonal matters.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.